United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
Haynes N. Johnson

74-1730

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

CITIZENS FOR BALANCED ENVIRONMENT AND TRANSPORTATION, INC., successor in interest of Committee to Stop Route 7, et al.,

Plaintiffs-Appellants,

v.

JOHN A. VOLPE, et al.,

Defendants-Appellees.

CIVIL APPEAL
DOCKET NO. 74-1730

On Appeal from District Court of Connecticut, Newman, J., Dkt. 15,054

APPELLANTS' BRIEF

ON APPEAL

July 3, 1974

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I

ISSUES ON APPEAL

The issues deal with the State-Federal relationship as it pertains to expressway planning and construction and the applicability thereto of the National Environmental Policy Act, 42 U.S.C. 4332 ("NEPA"). The issues are:

1. Can a State divide expenditures between Federal and State highway funds at a location in an expressway where no exit exists and so avoid having NEPA apply to the State-funded portion?

2. Can one "package" authorizations for Federal and State funding over the totality of an expressway for planning purposes, but avoid compliance with NEPA on selected portions of the expressway by using only State funds on those portions?

3. Can a unitary, federal-funded expressway project be divided into State and Federal-funded sections, after suit is filed, and so have NEPA apply only to the "Federal" portions of the expressway?

4. Can a State follow procedures to maintain eligibility for federal funding of an expressway until the time a specific project on the expressway is offered for bid (or suit is filed) and, thereafter, abandon interest in Federal funding (if NEPA requirements become onerous) without being bound by the provisions of NEPA?

5. At what time in the course of following procedures

to establish eligibility for Federal funding does a State become irrevocably committed to complying with Federal statutes?

6. Does the fact that an expressway section may also serve local needs excuse compliance with NEPA?

7. Whether the cumulative effect of factors such as following Federal eligibility procedures, receiving Federal planning and construction money, and the like, constitutes a "Federal" action?

II

STATEMENT OF THE CASE

A

Nature of the Case

Plaintiffs - Appellants, Citizens for Balanced Environment and Transportation, Inc. and certain individuals (together herein called "CBET") seek to enjoin certain officials of the Connecticut Department of Transportation ("CONNDOT") from constructing 4.7 miles of a new U.S. Route 7 limited-access expressway running north from Danbury, Conn., to Brookfield, Conn. (Route shown on Plf. Exs. X and EEE).

CBET contends that an environmental impact statement ("EIS") is required under the National Environmental Policy Act, 42 U.S.C. 4332(2)(c), ("NEPA") because, inter alia, the State (CONNDOT) not only followed all steps to maintain eligibility to receive Federal funding, but also actually received Federal funding for the project. That practice did not stop until CONNDOT was enjoined in 1972 (by CBET's predecessor) from constructing a related portion of U.S. Route 7 expressway south of Danbury, (346 F.Supp. 731).

On May 10, 1974, the District Court of Connecticut, by Hon. Jon O. Newman, denied injunctive relief finding, in essence,

that NEPA was not applicable because the expressway was not a "Federal action".

B

Course of the Proceedings

1. Prior Proceedings

In the Spring of 1972 CBET's predecessor and others filed suit under NEPA and other statutes to enjoin construction of a proposed new limited access U.S. Route 7 expressway from Norwalk, Conn., north through Danbury to New Milford, Conn. The Court, Newman, J., enjoined construction from Norwalk to Danbury. Committee to Stop Route 7, et al. v. Volpe, et al., 346 F.Supp. 731 (D.Conn. 1972)*

Shortly thereafter CONNDOT sought a ruling that NEPA would not apply and no EIS would be required for the proposed portion of U.S. Route 7 north of Danbury "if" only State funds were used. The Court declined to rule, considering the issue "not ripe for adjudication", __F.Supp.__, 4 ERC 1681, 1683 (D.Conn. Sept.6,1972).

On November 21, 1973 CONNDOT advertised for bid 4.7 miles of the expressway from Danbury north to Brookfield (Projects ** 34-124 and 18-95, Plf. Ex. V), and, on December 5, 1973, CBET

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* An appeal was filed and later withdrawn. Dockets 72-2412,2413,2433.

** Total highway construction plans are divided into "projects" for administrative and fiscal convenience. For this and other highway procedures, see "An Analysis of Administration of the Federal-Aid Highway Program", by Peterson & Kennan, 2 ELR 50001 (1972). See also Morris (Tr. 122) and Siccardi (Tr. 113 - 1st trial)

moved to enjoin construction of that section. CONNDOT admitted that the effect upon the environment was "major" and "significant" (if NEPA applied) (Plf. Ex. CC; See Appendix), and trial was held on January 29 and 30, 1974, solely on the issue of whether NEPA applied, i.e., whether there was Federal involvement.*

2. Disposition in Court Below

On May 10, 1974 the Connecticut District Court, Newman, J., denied CBET's motion for injunction against construction north of Danbury, __F.Supp.__, 6 ERC 1595. The present appeal was taken May 15, 1974. (See Appendix, p. 12, for Opinion)

A motion for an injunction pending appeal was denied by the District Court on June 12, 1974, and by this Court on June 25, 1974. At the time it denied an injunction, this Court granted a preference, permitted typewritten briefs, and waived the requirement for an Appendix (except for the District Court decision).

3. Related Proceedings

A similar injunction was issued by the District Court in Vermont, Oakes, C.J., against construction of a portion of the proposed U.S. Route 7 expressway in Vermont. Conservation Society of Southern Vermont, et al., v. Volpe, et al., 343 F.Supp. 761 (D.Vt.

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* The Federal Government took no position in the matter (Tr.23), but acknowledged that there was "a heavy burden on the State to prove that it is not federal." (Tr. 24; opin. p. 11).

Note: Transcript references will be cited as follows:
Trial of Jan. 29 and 30, 1974 - "Tr."
Trial of June 14 and 15, 1972 - "Tr. - 1st. Trial"

1972). In 1973 the Vermont Court denied a motion to dissolve the injunction pending preparation of an environmental impact statement covering the proposed new U.S. Route 7 expressway running through Connecticut, Massachusetts and Vermont, from Norwalk, Conn., to Burlington, Vt. Conservation Society v. Secretary, 362 F.Supp. 627 (D.Vt. 1973) (appeal pending, Dkt. 73-2629).

C

Statement of Facts

1. Description of U.S. Route 7

(a) The Existing Highway

U.S. Route 7 starts at the Connecticut Turnpike (I-95) in Norwalk, Conn., at Long Island Sound and goes north in Connecticut through Danbury, Brookfield, New Milford and Canaan (at the Massachusetts border) (Plf. Ex. EEE). It continues north through Massachusetts (Great Barrington, Lenox, Pittsfield, Williamstown) and Vermont (Bennington, Manchester, Rutland, Burlington).

U.S. Route 7 is a so-called "Federal-aid primary" highway, (Tr. 26-7; 23 U.S.C. §§ 103(b) and (f)). Mr. A.J. Siccardi, FHWA Division Engineer, responsible for Connecticut, defined this term. A "Federal aid highway" is:

> "...a highway which has been placed on the federal system...so that federal funds may be used in conjunction with state funds in an effort to design, construct a highway facility." (Tr. 27)

As a "primary" highway, its function is "to serve major population areas." (Tr. 27-8; see also Morris Tr. 118)

State Highway Commissioner George Koch defined Route 7 as "a principal north-south route...an artery from the north to the south or vice versa." (Tr. 275).

(b) The Proposed New Route 7 Expressway in Connecticut

(1) The Expressway from Norwalk to New Milford

The proposed new Route 7 expressway in Connecticut is shown in the Official Connecticut Road Map (Plf. Ex. EEE; App. 33 also Plf. Exs. G-1, G-2, K and X). As can be seen it starts at the Connecticut Turnpike (I-95) in Norwalk, goes north through Wilton, Ridgefield, Redding, Danbury, Brookfield, and New Milford.

Sections already constructed (all with Federal funds) include a one-mile spur in Norwalk, Connecticut connecting with the Connecticut Turnpike (I-95) (Df. Ex. 72, ¶ 10; Tr. 176-7, 1st trial), a spur in Danbury extending south from I-84 (Tr. 66), a northeast-southwest section in Danbury where I-84 and Route 7 overlap (Tr. 56), a spur north of the overlap (Tr. 63), and a bridge at the northern end of the latter section (Tr. 59, 61-2). See also prior opinion 346 F.Supp. at 734.

The portion of the expressway now before this Court runs from the bridge on New Route 7 in Danbury through the Still River floodplain and aquifer to just south of Brookfield (it can best be

seen in the chart Plf. Ex. X)*. There is no entrance or exit at the southern end without crossing the Federally-funded bridge and then travelling on the spur connecting the new expressway with the overlapping portion of I-84 and Route 7. As the District Court described it:

> "...cars travelling north from Danbury on new Route 7 will cross the federally-funded bridge and remain on the state-funded portion of new Route 7 for about one mile until the first exit is reached. Similarly, cars coming south toward Danbury on new Route 7, after passing an exit one mile north of the bridge, will have to cross the bridge and continue on into I-84..." (Opin. pp. 3-4)

See also Johnson (Tr. 142-4); Morris (Tr. 121).

Similarly, the very northern terminus of the project has no utility standing alone without further construction to the north (Morris Tr. 123-4). Thus, the projects, by themselves, have no "logical terminus" at either end.**

The portion presently enjoined under NEPA is that running from Norwalk to Danbury.

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* See also Niering affidavit (Plf. Ex. JJJ) filed with moving papers and used on motion for injunction pending appeal. App. p. 4

** FHWA's PPM 90-1, ¶ 3a defines "highway section" for EIS purposes as "a substantial length of highway between logical termini"; and ¶ 6 says the highway section included in an EIS should be "as long as practicable to permit consideration of environmental matters on a broad scope. Piecemealing proposed highway improvements in separate environmental statements should be avoided. If possible, the highway section should be of substantial length that would normally be included in a multiyear highway improvement program" (PPM 90-1 is found in Df. Ex. 5).

The southern "logical terminus" is not the end of the "project" but is, at least as far south as Danbury "center" (Tr. 65-66)

(2) The Expressway was Planned as a Single Entity

In 1966, at the request of the State Highway Department (under Conn. Gen. Stats. 13a-59), Connecticut's Governor Dempsey approved relocating U.S. Route 7 as a limited access highway between Norwalk and the Massachusetts border (Plf. Ex. NN). The highway was to be a:

> "...relocation of U.S. Route 7 and connectors thereto between the Connecticut turnpike in Norwalk, and the Connecticut-Massachusetts state line, as a limited-access highway..." (Plf. Ex. NN; App. p. 34

In its first decision, the District Court made a finding on the length of the expressway:

> "...the highway is a 31-mile, four-lane limited access expressway to replace U.S. Route 7 from Norwalk to New Milford, and perhaps eventually on to the Massachusetts line..." (346 F.Supp. at 733)*

It was found that the expressway would have a significant impact upon the environment:

> "...the plaintiffs have demonstrated, and the defendants have conceded, that in fact the proposed new expressway will have a major impact on the environment..." (346 F.Supp. at 739) (See also Df. Adm., Plf. Ex. CC, and Tr. 58 - 1st trial)

In its clarifying decision two months later (Sept. 1972), the Court reaffirmed its finding that the proposed expressway was

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* Commissioner Koch defines a limited-access expressway as one with interchanges, no crossings at grade, and a median strip (Tr. 229-230)

to run from Norwalk at least to New Milford:

> "...the proposed action is to build an expressway that links Norwalk with, at least, New Milford. In considering alternatives to this proposal, a proper impact statement will have to give appropriate consideration to the need for an expressway at least between these two cities, and, if the need is established, then to the pros and cons of alternate routes..." (4 ERC at 1682).

Thus, the totality of the project was decided, as between the parties, before the present problem arose.

In its most recent decision, now on appeal, the Court found:

> "...there is no doubt that the State plans to build a four-lane limited access expressway from Norwalk to New Milford...from the State's perspective it is one highway..." (Opin. p. 11)

The District Court found that the 4.7 mile segment of new expressway presently at issue will affect the need for the proposed and presently enjoined expressway south of Danbury:

> "It is true, as plaintiffs contend, that construction of the portion north of Danbury will provide additional reason for construction of the portion south of Danbury..." (Opin. p. 13)

The total, unsegmented aspect of the expressway is emphasized by the fact that the State Legislature viewed the Norwalk to Brookfield section as a unit (which includes the Danbury to Brookfield section here in issue):

"...to the extent the highway was thought of in two parts, the dividing line was a point near Silvermine Road in Brookfield, north of Danbury. This apparently stemmed from the fact that the State legislature authorized bonding in two stages, and the first stage reached from Norwalk only to this point in Brookfield. See Conn. Gen. Stat. § 13a-18(b)(6)" (Opin. p. 12) (See Tr. 278, 204, 245).

The whole expressway was deemed unitary by CONNDOT. Mr. Sherwood Bothwell, Chief, Consultant Design, of CONNDOT's Bureau of Highways, testified:

"Q. So would it be fair to conclude, from your knowledge, of this, that the plan was to build an expressway from Norwalk to New Milford?

"A. Right.

"Q. And your job, then, was to design a highway, expressway, a limited-access expressway, from Norwalk to New Milford; is that correct?

"A. This is correct." (Tr. 113-4 - 1st trial)

He also testified that the route all the way to New Milford was "one planning project" (Tr. 113 - 1st trial); and that all of the sections "are directly dependent one upon another" up to New Milford. (Tr. 121 - 1st trial).

In his affidavit of June 13, 1972 (Df. Ex. 59) Highway Commissioner Koch stated:

"...this route is different from the normally Federally aided improvement due to the commitment by the Connecticut Legislature to construct this entire route from Norwalk to New Milford..." (¶ 13) (emphasis supplied) (See also Tr.204)

In the context of that statement, Mr. Koch testified:

> "...we have been planning and designing Route 7 as a total route system from Norwalk to New Milford." (Tr. 168 - 1st trial) (emphasis supplied)

Commissioner Koch and David Johnson, Chief Design Engineer for CONNDOT, agreed that the segments now out for bid were a part of a large expressway (Tr. 205, 220 and 160-1). Johnson testified that persons would use it to get from residences north of Danbury to jobs south of Danbury. (Tr. 148-9, 176) (Cf. Plf. Ex. UU).

The "Connecticut Master Transportation Plan for 1974" shows a totality of existing projects sufficient to build a "New Expressway" from Norwalk to New Milford (Plf.Ex. Z,pp.A-6 &A-7; see also Plf.Ex. 7). (Plf.Ex. S, item 23, shows a "New Expressway at Canaan).

(3) Continuation of the Expressway, North of New Milford

Previous years' studies included improving Route 7 north of New Milford (Df. Ex. 1-A) and reconstructing it from Canaan to the Massachusetts border (Df. Ex. 1A). The route map in evidence (Plf. Ex. K) and the map attached to the notice of public hearing of January 25, 1968 (Df. Ex. 55) both show lines for possible future extension north of New Milford.

Testimony and documentary evidence also show that serious consideration has been given to extending the expressway further north:

1. Mr. Johnson said that its northern "terminus" in New Milford was so placed as to permit extension northward (Tr. 151-154; also Koch Tr. 272) (see his mark "A" on the map of Plf. Ex. DDD).

2. The 1968 planning report (Df. Ex. 35) states that:

> "...it has been considered important that the location of a new highway terminating in New Milford would be flexible enough for a future extension to the north..." (p. 12)

3. The map attached to the information sheet used for a public hearing actually shows the "possible future extension" to the north (Plf. Ex. II); and Johnson agreed that this was north of his point "A" (Tr. 159-160) (Plf. Ex. DDD) (See also Plf. Ex. K).

4. Right-of-way adequate for a four-lane expressway has been acquired between Canaan, Conn. and the Massachusetts border (Plf. Ex. CC, ¶ 6).

5. As previously stated, Governor Dempsey approved relocating Route 7 "between the Connecticut Turnpike in Norwalk and the Connecticut-Massachusetts State line, as a limited-access highway", under Conn. G.S. 13a-59 (Plf. Ex. NN).

Further, Commissioner Koch agreed that Route 7 is planned as a "principal arterial" under the "1990 Needs" study made for the FHWA, and accepted the definition of "principal arterial" as set forth in Plf. Ex. FFF(Tr. 276-7). This definition includes continuous routes that:

"...Serve projected corridor movements having trip length and travel density characteristics indicative of substantial statewide or interstate travel." (Plf. Ex. FFF) (emphasis supplied)

Thus, the planned Federal-aid expressway here in issue involves much more than 4.7 miles north of Danbury. It is part of a plan to go from Norwalk to New Milford and beyond.*

Plaintiffs' transportation expert Robert L. Morris testified, based upon his examination of documents in the Vermont case, that the planned expressway runs from Norwalk to Burlington, Vermont (Tr. 122) (Cf., Vt. decision 362 F.Supp. 627; appeal pending dkt. 73-2629). He further testified that, regardless of planning, construction of the segments now in issue would coerce extension north of New Milford (Tr. 126).

2. Federal Funds Have Already Been Used

(a) Construction Money

The District Court found that Federal money has already been spent on the Route 7 expressway north of Danbury (Opin. p. 8). The Federally-funded portion is inextricably tied in with the new

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* Since trial, it has been discovered in an official document of CONNDOT, "Connecticut Transportation Needs Study 1974", that CONNDOT plans to "relocate" two miles of Route 7 north of New Milford almost to Kent (see p.A-11 in the study; appendix). (Judicial notice of this fact would appear to be proper.)

state funded section for, as shown above, supra, p.8 one cannot use the southern portion of the new section without also using a spur and bridge paid for by Federal money.

$465,000 in Federal highway money (23 U.S.C. § 103(b) and § 105(c)) was spent in building the bridge at the northerly end of that portion of the already constructed new Route 7 expressway (the northernmost section of the brown-colored expressway on the chart, Plf. Ex. X) (Opin. p.3) (Siccardi Tr. 57-59)*

Defendant Siccardi testified that about $40,000,000 of Federal "Interstate" money had been spent for construction where Routes I-84 and 7 overlap for about three miles in Danbury (Tr. 56-57), and that this included the northerly Route 7 spur (Tr. 65 (brown-colored on Plf. Ex. X) and about a mile of southerly extending Route 7 spur (to be part of the proposed Danbury to Norwalk route) (Tr. 66-67). Messrs. Koch and Johnson agreed that the Norwalk to New Milford route has been planned to include this overlap with I-84. (Tr. 252 and 163-164).

Thus, two kinds of Federal construction money have been used:

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*CONNDOT admitted that there will be "no exit for northbound traffic on the presently existing new Route 7 expressway until said traffic has travelled over about one mile on project 34-124" after crossing the bridge (Plf. Ex. CC, ¶ 4(c), see Appendix), and that the existing exit ramps will be removed (Plf. Ex. CC, ¶ 4(b)).

1. "Primary" money amounting to some $465,000 Siccardi (Tr. 57-59 and; Plf. Exs. XX and YY).

2. "Interstate" money amounting to some $40,000,000 (Siccardi Tr. 57).

(b) Planning Money

In addition to Federal construction money, Federal Highway Planning and Research ("HPR") funds were used in planning the Danbury to New Milford section. These were something over $50,000 (Opin. p.5) (Siccardi Tr. 53-55, 83; Plf. Exs. WW, XX and YY). They resulted in a planning report (Df. Ex. 35; Drake, CONNDOT Director of Planning, Tr. 303), approved by FHWA (Plf. Exs. OO and PP; Siccardi affid., Df. Ex. 72 ¶ 12), and also paid the costs of the corridor hearings north of Danbury (Drake Tr. 303, and Plf. Exs. EE, GG, HH). The Brookfield hearing (Plf. Ex. EE covering projects 34-124 and 18-95) was certified to the FHWA (Drake Tr. 303 and Plf. Ex. FF).

Not only was Federal planning money used, but also CONNDOT and FHWA planned the projects together. They approved the planning reports (supra) and worked out the overlap of Routes 7 and I-84 so it would serve both north-south and east-west needs (Koch Tr. 252; Johnson Tr. 163-5)*

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* CONNDOT again affirmed this common Federal-State planning in the Lamm affidavit which it used in opposition to CBET's motion for preference. The affidavit stated that the proposed Route I-84-Route 7 Interchange "was made compatible with a proposed relocated Route 7" (¶ 9). Lamm is Executive Director of the Federal Highway Administration (¶ 1).

3. CONNDOT has Maintained its Eligibility For and Planned on Using Additional Federal Funding

(a) FHWA Eligibility Procedures

For a State to ultimately receive Federal funding for highway construction, it must follow a series of procedures to satisfy the Federal-aid Highway Act, 23 U.S.C. § 101 et seq. at § 128 relating to hearings. These procedures are set forth in FHWA Policy and Procedure Memorandum 20-8 ("PPM 20-8", Df. Ex. 3)*

In essence (aside from satisfaction of NEPA, PPM 90-1, Df. Ex. 5), the procedures require:

1. Corridor hearings and approval to establish the location of the proposed highway, followed by

2. Design hearings and approval, dealing with the specific design within the approved location. (PPM 20-8)

PPM 20-8 initially required only corridor hearings (Df. Ex. 2) but was amended January 14, 1969, (Df. Ex. 3) to require design hearings also (Df. Ex. 72, ¶ 17). Thus, during the times here pertinent, hearing requirements were:

> "Both a corridor public hearing and a design hearing must be held, or an opportunity afforded for those hearings, with respect to each Federal-aid highway project that:

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* Subsequently codified as 23 CFR Chap. I, Part 790, effective May 9, 1973. See discussion in Peterson & Kennan, supra, in 2 ELR at 50012.

(1) Is on a new location..." (PPM 20-8 ¶ 6a)

In addition, the design hearing could not be held until "after the route location has been approved" (PPM 20-8, ¶ 4b(1)) (See also Siccardi, Tr. 44, and Opin. p. 8)

(b) CONNDOT has Maintained its Eligibility For Federal Funding

Until the first trial herein (June 1972), CONNDOT had not decided whether it would use State or Federal funds north of Danbury on projects 34-124 and 18-95 (Answer to Complaint ¶ 13). Nevertheless, all Federal procedures were followed so that the State could, if it wished, qualify for Federal funding. Commissioner Koch testified:

> "Q. In your work on the Norwalk to New Milford section, did you follow federal procedures that would enable you to get federal funding to the fullest extent possible?
>
> "A. I would have to say yes, we have." (Tr. 206)

See also Koch affidavit (Df. Ex. 59 ¶ 9).

Federal Division Engineer Siccardi agreed and said there had been "excellent adherence by the department to the requirements of PPM 20-8" (Df. Ex. 72 ¶ 43).

The procedures followed and hearings held, after NEPA became effective, to assure satisfaction of Federal requirements, were exemplary of CONNDOT's interest in Federal money. In addition to corridor hearings, design hearings were held after PPM 20-8

was amended to also require them. (Siccardi affid. Df. Ex. 72 ¶ 16 and 17).

The pattern of hearings shows that the State held design hearings after the effective date of NEPA (See Siccardi affid., Df. Ex. 72),

Corridor hearings:

Brookfield	1/5/67	(Plf. Ex. EE)
New Milford	10/10/67	(Plf. Ex. GG)
New Milford	1/25/68	(Plf. Ex. HH)

Design hearings:

Brookfield	9/30/70	(Df. Ex. 53)
New Milford	1/27/72	(Df. Ex. 55)

So, to within four months of the time the complaint was filed, CONNDOT was <u>still preparing for possible Federal funding</u>. (There is no other reason to have held <u>design</u> hearings, since Conn. Statutes provide only for location hearings, G.S. 13a,58; App.p.53

(c) <u>Federal Approval has Been Obtained</u>

The District Court found that an approval of "no less significance" than location approval had taken place, i.e., "route revision" and found that this approval:

> "...is not only sufficient to constitute location approval...but...is more detailed than that required to obtain location approval. Moreover, both the federal and state defendants agree that projects on the Danbury-New Milford span not yet advertised for bid remain eligible for federal funding. That could be so only if the design public hearing that was held in conformity with federal regulations was preceded by location approval..." (Opin. p.8)

In addition, a series of Federal approvals have been given for that part of the expressway south of Danbury (Df. Exs. 30, 48, 49)

(d) Federal Funding is Part of the Total Entity

CONNDOT, in planning the expressway, budgeted as a "package", total available State and Federal funds for the total route*. This is shown in two relatively current documents, a report to the Lieutenant Governor (Plf. Ex. SS) and a program plan for U.S. Route 7 from Norwalk to New Milford (Plf. Ex. VV)

The first of these, entitled "Relocation of Route 7", dated April 15, 1971, deals with the financing aspects. It couples State and Federal funds:

> "For the sections of Route 7 from the vicinity of Belden Avenue in Norwalk to north of Silvermine Road in Brookfield, we have $136.5 million in bonding authorized. To this we may add $23.8 million in Federal aid, making a total of $160.3 million available or authorized..." (Plf. Ex. SS, p.2, see Appendix) (emphasis supplied)

Commissioner Koch authenticated the report (Tr. 221-2, 248).

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* When planning a total route, it makes little difference where a particular Federal or State dollar is placed. Note in this respect 1) CONNDOT's Admission in Answer ¶ 13 that no decision on funding of the projects here in issue had been made, and 2) CONNDOT's motion after trial inquiring whether the northern portion would be free of NEPA "if" State funds were used (supra p. 4)

A second document, prepared after the first trial, by "Division of Programming & Scheduling, 2/26/73", (Plf. Ex. VV, see Appendix) likewise deals with the financing of the route from Norwalk, across the Merritt Parkway and I-84 to Brookfield. It includes Projects 34-124 and 18-95 here in issued (identified as item "12", Tr. 218). It includes the following tabulation (abridged):

"(in millions)	Funds Avail.	Allocated	Unalloc. Bal.
Bond Auth.	$136.5	$59.5	$77.0
Fed.Aid Anticip	28.4	15.3	13.1
Total to Date	$164.9	$74.8	$90.1"

(Plf. Ex. VV; App. p. 45)

Commissioner Koch testified as to these documents, saying that CONNDOT had prepared a budget from Norwalk to New Milford. Its purpose was to determine the "amount of money, both state and federal that is available for this particular project [from Norwalk to New Milford]" (Tr.215). With reference to Plf. Ex. VV, supra, he agreed that on this total Norwalk to New Milford project CONNDOT was "anticipating twenty-eight million dollars in Federal funds." (Tr. 216,248)

III

ARGUMENT

A

Summary

In essence, this appeal comes down to the relationship between State actions and application of Federal environmental laws: How far may a state go in using Federal funds, "keeping its options open" for more Federal funds, and planning in conjunction with FHWA, without being bound by NEPA?

Here CONNDOT has:

1. Used Federal money on the very projects in issue;

2. Retained its "right", up to the last moment, to get more;

3. Considered the total of State and Federal funds for the entire route as a "package";

4. Been in partnership with the FHWA, but dropped out after being sued;

5. After being sued, split the planned expressway into two segments seeking to avoid NEPA; and

6. Thereafter asserted that a portion of a major, possibly multi-state, expressway was to serve "local" needs, and so was outside Federal law.

Permitting CONNDOT to act in such manner, reduces NEPA to a "hollow exercise" Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109, at 1128 (D.C. Cir. 1972).

The District Court "blessed" this approach by concluding that a State could keep its options open and so avoid NEPA compliance if such appeared onerous:

> "...Since [the State] need not elect to take federal funds until the end of the planning and design process, they can retain the option of foregoing federal funds if NEPA compliance appears onerous..." (Opin. p.9, emphasis supplied)

The facts of this case and the District Court's conclusions themselves represent one of the best reasons why NEPA should apply. For to permit the "option" concept would be to permit emasculation of NEPA. It is counter-productive to the policy provisions of the Act and counter to the provisions that the statute must be complied with "to the fullest extent possible". 42 U.S.C. § 4322. This rule was expounded in Monroe County Conservancy Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972), where the Court found:

> "Congress directed that NEPA, which provided for an impact statement, was to be implemented to 'the fullest extent possible,' 42 U.S.C. § 4332. In using this language, it was not creating a loophole to avoid compliance, but rather was stating that NEPA must be followed unless some existing law applicable to the agency made compliance impossible, Conf. Rep. No. 91-765, 91st Cong., 1st Sess., U.S.Code Cong. & Ad.News, pp. 2767, 2770 (1969). See also Ely v. Velde, 451 F.2d 1130, 1138 (4 Cir. 1971). Calvert Cliffs', supra, 449 F.2d at 1114-1115..." (p.697)

See also Annotation "Construction and Application of §§ 101-105 of National Environmental Policy Act of 1969", 17 ALR Fed. 33 at 158 (1973).

B

Once a State Has Acted in Anticipation of Federal Funds, It is Deemed to be in Partnership with the Federal Government And is Thereafter Bound by Federal Statutes

Federal funding has been planned for, and has already been used for the Danbury interchange, north and south Route 7 spurs, for the bridge, for the Norwalk interchange, for public hearings and for planning (supra, pp.14 ff). Consequently, the State is in "partnership" with the Federal Government and must follow Federal statutes, including NEPA.

In Named Individual Members v. Texas Highway Dept., 446 F.2d 1013, 1027, 1 ELR 20379 (5th Cir. 1971), the Court specifically spoke to the partnership issue:

> "The State argues that it is 'absolutely committed' to building the North Expressway regardless of what this Court decides about the validity of the Secretary's action, and that this Court has no power to require the State to comply with the law in building the project because the State is determined to build the highway with its own funds, 'if necessary'.
>
> * * *
>
> "We are not impressed with this argument. If we were to accept it, we would be giving approval to the circumvention of an Act of Congress. The North Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970. As such, the North Expressway is subject to the laws of Congress, and the State as a partner in the construction of the project is bound by those laws." (446 F.2d at 1027) (Emphasis supplied)

The Court believed this principle of applicability of Federal law to be beyond challenge:

> "This principle has been characterized as 'beyond challenge' by the Supreme Court. See Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275,295, 78 S.Ct. 1174, 1185 (1958)" (footnote 27)

Similarly, Morningside-Lenox Park Assn. v. Volpe, 334 F.Supp. 132, 3 ERC 1327 (N.D. Ga. 1971) held:

> "...the Court's application of the NEPA applies to both defendants, and precludes both the state and federal defendants from continuing with the project until the environmental studies have been accomplished. This approach is taken in light of the fact that the state and federal defendants have engaged in this venture from its inception, and, since the project has been a federal project from the beginning, the state, as a partner in the project, is bound by federal laws and regulations..." (334 F.Supp. at 146) (emphasis supplied)

In the present case, corridor (location) and design hearings have been held for the entire length (Df. Ex. 72); corridor and design approvals have been had south of Danbury (Df. Exs. 30,48,49); location approval has been given north of Danbury (Plf. Ex. RR) (Opin. p.7); the FHWA and CONNDOT have together planned and built an overlapping I-84 and Route 7 in Danbury (supra, p. 14); and Federal planning money has been used north of Danbury (supra, p.14).

Not only have procedures been followed, but Federal and State officials have planned the highway together.

The "partnership" is well established.

C

Holding Corridor Hearings and Obtaining Approval is Deemed an Irrevocable Act Anticipatory to Federal Funding and, Therefore, Binds the State to follow Federal Statutes

Until the present decision, it has been uniformly held that actions taken by a State to keep its options open, so it could later decide whether to use Federal funding, serve to bind the State to Federal statutes. At the latest, the State is bound when location approval is obtained.

Here both corridor and design hearings have taken place, (supra p. 19).

La Raza Unida v. Volpe, 337 F.Supp. 221, 1 ELR 20642 (N.D. Calif. 1971), held that once corridor approval is obtained, Federal statutes must be complied with:

> "The Court believes that for the purpose of applying the various federal statutes and regulations a federal-aid highway is any project for which the state has obtained location approval. The state should not have the considerable benefits that accompany an option to obtain federal funds without also assuming the attendant obligations. Any project that seeks even the possible protection and assistance of the federal government must fall within the statute and regulations." (337 F.Supp. at 227) (emphasis supplied)

Quoted with approval in Indian Lookout Alliance v. Volpe, 484 F.2d. 11, 3 ELR 20739 (8 Cir. 1973), with the comment:

> "...there is no doubt that location approval is a critical stage in determining when a project becomes a 'major Federal action'..." (484 F.2d at 16)

La Raza went into policy considerations supportive of its position:

> "Finally, in addition to the strong policy statements and the wording of the statutes and regulations, common sense dictates that the federal protective devices apply before federal funds are sought. It does little good to shut the barn doors after all the horses have run away. If the federal statutes and regulations are to supply any protection at all it must be prior to the time the residents have left and the deleterious effects to the environment have taken place. All the protections that Congress sought to establish would be futile gestures were a state able to ignore the spirit (and letter) of the various acts and regulations until it actually receives federal funds. Given the realities of actual highway displacement and construction, the statutes and regulations must apply immediately or their purpose will be frustrated." (337 F.Supp. at 231 (emphasis supplied)

In the present case, the District Court, without contrary citation, refused to follow La Raza, even though it did find location approval had been given (Opin. p.7-8). It stated:

> "...Though recognizing the force of the argument developed in La Raza Unida, this Court concludes that while Congress no doubt has power to require NEPA compliance in such circumstances, the existing legislation simply does not do so." (Opin. p.9)

Sierra Club v. Volpe, 351 F.Supp. 1002 (ND Calif. 1972), followed La Raza and considered Congressional intent:

> "The rationale of La Raza Unida is that Congressional policy statements in federal environmental and similar statutes, together with the legislative history of these enactments, indicate a great concern of Congress with problems of environmental protection, particularly in the area of highway construction; that common sense suggests that all the protections which the Congress has sought to provide would be futile gestures were the states and federal agencies allowed to ignore federal statutes and regulations until deleterious effects upon the environment have actually occurred while the option for receiving federal funds still remains open." (351 F.Supp. 1007)

See also James River and Kanawha Canal Parks, Inc. v. Richmond, 359 F.Supp. 611 (E.D. Va. 1973), affd. per curiam 481 F.2d 1280 (4 Cir. 1973); Ely v. Velde, __F.2d__, 6 ERC 1558 (4th Cir. May 1974); Latham v. Volpe, 455 F.2d 1111 (9 Cir. 1971); City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972); Thompson v. Fugate, 347 F.Supp. 120 (E.D.Va. 1972). See also Anderson, NEPA in the Courts, 1973, pp. 64ff.

The District Court's position is contrary to precedents and to the intent of Congress. The present case, itself, shows why NEPA should apply at an early stage.

D

Having Once Accepted Federal Funds, Federal Statutes Apply.

Federal money has already been accepted for construction and for planning (supra, pp.14ff). This, then, irrevocably, ties in Federal law, for it becomes a "Federal Action". Anderson, NEPA in the Courts, 1973, summarizes the rule:

"The application of NEPA to the Federal matching program for funding of state-federal highways has been the subject of rather extensive litigation. However, there is no doubt that all the types of highways involved are subject to NEPA's requirements. This is true for the interstate system, the 'primary' road system, road upgradings, and probably repair grants...[citations]" (pp. 59-60)

Federal money was actually returned by the State in Named Individual Members, supra. A report of this is found in Peterson and Kennan, supra, 2 ELR at 50022-3. The Court had held that a State:

"...may not subvert [the principle of Supremacy of Federal law] by a mere change in bookkeeping or by shifting funds from one project to another." (446 F.2d at 1027)

As Peterson and Kennan's article shows, return of money did not relieve the State of its Federal obligations. The article concludes on this point:

"...the most striking feature of San Antonio [Named Individual Members] was the Texas Highway Department's blatant defiance of federal environmental protection laws: the Department's conduct underscored the fact that it proposed, through shifts in funding, to do indirectly what it was unable or unwilling to do directly. Federal highway funds requested in greater proportions than usual for other highways in the state would have subsidized the state-funded construction of the North Expressway." (2 ELR at 50023)

See also Sierra Club v. Volpe, supra.

Though CONNDOT assures that its intent was to fund the construction with State money only, the only document it could produce in support of this position (and before litigation) was dated 1965. Other, more current documents, are to the contrary (supra, p. 20).

E

One Cannot Defeat the Application of Federal Statutes by Dividing Portions Of a Highway System into Federally-Financed and non-Federally-Financed Segments

Every bit of testimony and evidence prior to the first suit shows that an expressway has been planned from Norwalk to at least New Milford. (supra, p. 9) (And the Vermont case indicates the expressway will run a good bit farther, 362 F.Supp. 627 at 637).

So we find the State, having lost in the Norwalk to Danbury section, because of Federal funding, trying what has become the "oldest highway game" in the books. It seeks to defeat NEPA by segmenting funding.

Such cannot be done.

Sierra Club v. Volpe, supra, cites a case that could well be the present one:

> "In Thompson v. Fugate, 347 F.Supp. 120 (E.D. Virginia, 1972), the court, applying both the Federal Aid Highway Act of 1968 (23 U.S.C. § 128(a) as amended) and NEPA, held that meeting federal requirements for one twenty one mile section of a highway project in order to partake of federal aid allotments for that segment, while at the same time claiming that a remaining eight mile section is a separate project, would be an impermissible bureaucratic frustration of the purpose of these laws." (351 F.Supp. at 1068)

See also:

Named Individual Members v. Texas Highway Department supra.

Thompson v. Fugate, 452 F.2d 57 (4th Cir. 1972); on remand 347 F.Supp. 120 (E.D. Va. 1972)

Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir. 1972)

Ely v. Velde, __F.2d__, 6 ERC 1553 (4th Cir. 1974)

James River Kanawha Canal Parks, Inc. v. Richmond, supra.*

In the present case CONNDOT has not only attempted to segment the Norwalk to New Milford expressway into two pieces (Norwalk to Danbury, and Danbury to New Milford), contrary to its and the legislature's original intent (supra, pp. 9-11), but has also tried to split the sections north of Danbury into two parts (one already constructed with Federal funds and the immediately-adjacent "state-funded section here at issue supra, p. 4), even though the two together represent one continuous expressway with no intervening exits.

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*James River, was a situation where the original plan had been to use state funds and the project had always been deemed local. Federal funds were considered only later when dollar shortages appeared.

F

Environmental Impact Statements Must Be Prepared at the Earliest Possible Time In the Planning Stage so that they Will Not be too late to have Realistic Effects Upon Overall Planning

If environmental impact statements are to be meaningful, they must be prepared early, before a series of segments are built. Otherwise, as in the present case, the segments will "force" additional construction to the south.* As the District Court found:

> "...construction of the portion north of Danbury will provide additional reason for construction of the portion south of Danbury..." (Opin. p. 13).

In the present case, CONNDOT is, on the one hand, preparing an EIS for that portion of the Norwalk-New Milford expressway south of Danbury, while at the same time is engaged in construction of part of the same expressway to the north. It is, as said before, in the words of Calvert Cliffs, supra, going to make the EIS a "hollow exercise".

As so well recognized by Judge Oakes in his second Vermont decision:

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* Thus, irrespective of whether the Danbury to Brookfield section is "federal", it should be enjoined to project the existing Norwalk to Danbury injunction and the jurisdiction of the Court over it. United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968); Scott v. Young, 307 F.Supp. 10005 (D.Va. 1969), affd. 421 F.2d 143 (4th Cir. 1970); All Writs Act, 28 U.S.C. § 1651; Moore's Federal Practice, ¶ 65.08.

"The question then becomes whether under NEPA and the Intergovernmental Cooperation Act, 42 U.S.C. § 4231, an overall EIS may be required at any time, or whether particular segments of a highway may be constructed with an EIS required only as to those segments. This question is plainly one which goes right to the essence of the traditional federal-state highway planning process. It is not unlike, though of considerably less importance on an individual superhighway basis, the question before the United States Court of Appeals for the District of Columbia in the recent breeder-reactor case, Scientists' Institute for Public Information, Inc. v. AEC No. 72-1331 [5ERC 1418] (D.C. Cir. June 12, 1973". 362 F.Supp. at 636

* * *

"Of course an overall EIS for all of Route 7 would have one major consideration in mind, whether a superhighway is environmentally and otherwise the most viable alternative." 362 F.Supp. at 637.

See also: Scientists Institute for Public Information v. AEC, 481 F.2d 1079, (D.C. Cir. 1973); Calvert Cliffs,v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Sierra Club v. Froehlke, 359 F.Supp. 1289 (S.D.Tex. 1973).

G

NEPA is not Avoided by
Calling a Project "Local"

The District Court found that there was "independent justification for the Danbury-New Milford portion". (Opin. p. 12). This is arguable when one considers that a four-lane, limited access expressway is to be built to connect a city of 53,300 with another of $15,400 (Opin. p. 12). If this were the true purpose, much less highway, with much less environmental damage would suffice*.

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* Cf. Morris post-trial affidavit in Appendix (Received in evidence Tr. 290) in which he shows, using "blue book" charts and CONNDOT's own traffic projections, that a simple two-lane highway is the most that would be needed. See also Df. Ex. showing that much of the traffic is outside the area.

David Johnson, CONNDOT's Manager of Design, testified that the new highway was to serve the area from Norwalk to New Milford:

> "Q. So we are clear, how would you define the corridor that highway [north of Danbury; Plf. Ex. X, Tr. 147] would serve?
>
> "A. I think the simplest way to define the corridor is to relate it to hydraulics traffic, and if you want to relate it to hydraulics, its the drainage shed which this highway will serve. Essentially, it's from Norwalk to Danbury. Perhaps up to Norwalk, and the River Valley, and you get into Still River Valley and farther on you get into some other valley that the traffic is draining to, to existing Route 7 now, so that's the corridor location, essentially, from New Milford down to Norwalk, the valley of the existing Norwalk facility, Route 7 facility (Tr. 148-9) (Emphasis supplied).

But this appears to beg the issue.

Assuming, arguendo, that independent need exists, (1) "need" was not the subject of the District Court hearing (Tr. 267) so no decision can be based upon that issue; (2) permitting the present construction will undermine the existing Norwalk to Danbury injunction*, and (3) regardless, a NEPA statement is required on Federal projects serving local needs.

As to the third point, Federal actions require impact statements even if they serve local needs. Sierra Club v. Froehlke, supra, dealt with the so-called Trinity River Project (a proposed 363 mile channel) and the Wallisville Dam at the lower end. An overall

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* See Footnote, p. 32 .

impact statement was required and, to the extent portions of the project could be shown to be "local", statements were required for them:

> "...If and when the Corps can present to this Court additional evidence as to Wallisville's local purposes, and if this Court upon appraising such evidence finds that this project possesses in reality, substantial local purposes, then it will dissolve the injunction as to Wallisville upon the resubmission of an environmental impact statement which satisfies the requirements of NEPA in all other respects..." (359 F.Supp. at 1332) (Emphasis supplied)

In the present case, the issue revolved around "Federal" action, need was not being tried (Tr. 267), and the District Court thereby erred in its conclusion (Opin. p. 12) that "independent justification" for the projects (a four-lane expressway) existed. Regardless, no EIS has been prepared (Tr. 283).

Further, the fact that a project is "local" does not mean it cannot be a major* project governed by NEPA . Hanly v. Kleindeist, 471 F.2d 823 (2d Cir. 1972).

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*CONNDOT has admitted the project is major (Plf. Ex. CC, ¶ 3, in Appendix).

H

The Cumulative Steps Taken by CONNDOT Make the Expressway a Federal Action

Though CBET believes that NEPA applies, for the various individual reasons set forth above, the District Court raised the question of whether a finding of "Federal action" could be made based upon the "cumulative effect" of the various factors, and said the question was close (Opin. p.13).

The cumulative factors cited were:

> "...the federal dollars to build the spur that will connect new Route 7 to I-84 and the small amount of highway planning and research funds, the 'route revision' approval by the FHWA and the State's continued eligibility for federal funding for later projects north of Danbury, and the relationship between the Danbury - New Milford portion and the Norwalk - Danbury portion..." (Opin. p. 13)

The District Court might also have added the factors of cooperative planning (supra p. 16), the totalizing of State and Federal funds so the entire Norwalk to New Milford section financing could be viewed as a whole (supra p.26), and the federally-funded bridge that must be used when using the lower portion of the "state" funded portion of the expressway now before the Court.

The District Court held that the case law in the field has not yet developed a clear standard against which such a combination of factors is to be measured (Opin. p. 13). This may be, but the Council on Environmental Quality has a definition that leads to cumulative effects. Its definition of Federal "actions" includes:

"New and continuing projects and program activities: directly undertaken by Federal agencies; or supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance ...or involving a Federal lease, permit, license certificate or other entitlement for use." (40 CFR, Part 1500, § 1500.5 (a)(2))

Related is the NEPA phrase "significantly affecting the environment". Thus, CEQ considers the "overall, cumulative impact" (§ 1500.6(a)). See also Hanly v. Kleindeist, supra.

Legislative policy relating to "cumulative" is seen in the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4231. It states:

"(a) the economic and social development of the Nation...depend upon the sound and orderly development of all areas, both urban and rural...rules and regulations shall provide for full consideration of...

"(3) Balanced transportation systems, including highway, air, water, pedestrian, mass transit, and other modes for the movement of people and goods...

"(e) Insofar as possible, systematic planning required by individual Federal programs (such as highway construction, urban renewal, and open space) shall be coordinated with and, to the extent authorized by law, made part of comprehensive local and areawide development planning..."

Cf. Conservation Society v. Secretary, supra.

IV

CONCLUSION

For the foregoing reasons, CBET prays:

1. That the decision of the District Court be reversed and that construction of the new Route 7 expressway, or any steps relating thereto, be enjoined pending satisfaction of the requirements of the National Environmental Policy Act; and

2. That this Court reconsider its denial of an injunction against construction pending determination of this appeal, and grant said injunction.

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Mr. Daniel Fusaro, Clerk
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Re: Docket No. 74-1730
Citizens for Balanced Environment and Transportation, Inc., et al. v. John A. Volpe, et al.

Dear Mr. Fusaro

Enclosed are ten copies each of the Appellants' Brief on Appeal and Appellants' Appendix on the above-identified appeal.

At the hearing on a motion in this appeal on June 25, the Court granted permission to file typewritten briefs and dispense with the filing of an appendix except for the decision of the District Court being appealed from.

This will also certify that two copies each of the enclosed have been served on Appellees' counsel.

Sincerely,

Haynes N. Johnson
Attorney for Appellants

HNJ:Jls
Encls.

cc: Clement J. Kichuk, Esq.